

STATE OF MICHIGAN

APR 2004

IN THE

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SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Whitbeck, C.J. and White. and Donofrio, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court
No. 124083

-VS-

LATASHA GENISE MORSON,

Defendant-Appellee.

Court of Appeals No. 238750
Oakland County CC No. 99-167284-FC

APPELLANT'S REPLY BRIEF

(ORAL ARGUMENT REQUESTED)

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STATEMENT OF JURISDICTION

The People reiterate their statement of jurisdiction in Plaintiff-Appellant's Brief on Appeal.

STATEMENT OF QUESTIONS PRESENTED

I, II, IV. IS THE INTERPRETATION OF THE COURT OF APPEALS IN PEOPLE V LIBBETT, 251 MICH APP 353; 650 NW2d 407 (2002) OF MCL 777.31 AND MCL 777.33 WHICH GIVES EFFECT TO ALL WORDS AND PROVISIONS WITHIN THE STATUTES AND PROMOTES ACCURATE SCORING OF THE SENTENCING GUIDELINES, CORRECT?

The People, Plaintiff-Appellant, submit the answer is, “Yes.”

III. BECAUSE THE LEGISLATURE DID NOT LIMIT MCL 777.31(2)(b) AND MCL 777.33(2)(a) AND, WITH A BROAD INTERPRETATION OF THE STATUTES, CO-DEFENDANTS ARE HELD RESPONSIBLE FOR THE RAMIFICATIONS OF COLLECTIVE CRIMINAL ENTERPRISE, DOES MCL 777.31(2)(b) AND MCL 777.33(2)(a) APPLY ONLY TO THOSE OFFENDERS CHARGED WITH THE SAME CRIMES?

The People, Plaintiff-Appellant, submit the answer is, “No.”

V. BECAUSE MCL 769.31(d) DIRECTS COURTS TO CONSIDER AGGRAVATING FACTORS RELATING TO THE OFFENSE, AND VIOLENCE AGAINST A THIRD PARTY DURING THE SAME CRIMINAL TRANSACTION AS THE CHARGED CRIME IS AN AGGRAVATING FACTOR, CAN THE COURT CONSIDER THE ENTIRE CRIMINAL EPISODE WHEN SCORING OV 9?

The People, Plaintiff-Appellant, submit the answer is, “Yes.”

VI. WHEN A COURT’S SCORING OF THE SENTENCING GUIDELINES CAN NOT INCREASE A DEFENDANT’S STATUTORY MAXIMUM, DOES A SCORING OF OV 1, 3, OR 9 BY THE SENTENCING COURT VIOLATE DUE PROCESS?

The People, Plaintiff-Appellant, submit the answer is, “No.”

STATEMENT OF FACTS

The People adopt their statement of facts in Plaintiff-Appellant's Brief on Appeal.

ARGUMENT

I, II, IV. THE INTERPRETATION OF THE COURT OF APPEALS IN PEOPLE v LIBBETT, 251 MICH APP 353; 650 NW2d 407 (2002) OF MCL 777.31 AND MCL 777.33 GIVES EFFECT TO ALL WORDS AND PROVISIONS WITHIN THE STATUTES AND PROMOTES ACCURATE SCORING OF THE SENTENCING GUIDELINES.

Defendant has recognized the problem with automatically imputing scoring by another fact-finder to a defendant's case regardless of its accuracy. However, defendant's interpretation of MCL 777.31(2)(b) and MCL 777.33(2)(a) is confusing. Defendant first states that the "language of offense variables 1 and 3 indicates that the 'multiple offender' provisions require a judge to assess a defendant the same number of *accurately scored* points to other co-offenders." (emphasis supplied) [Defendant-Appellee's Brief at viii] Then defendant states that "[i]f the prior score is artificially too low or high under subsection (1), *it is the co-defendant's score that is in error* and should be corrected on appeal in his or her case." (emphasis supplied) [Defendant-Appellee's Brief at 18] Defense counsel then states that a defendant's judge should defer to the co-defendant's judge's scoring unless the prior scoring is clearly erroneous. [Defendant-Appellee's Brief at 22] However, defendant then asserts that if the scoring by co-defendant's judge were too high i.e. to defendant's detriment, there would be a constitutional violation. Apparently in that situation defendant's judge would not have to accord any deference to co-defendant's judge's scoring. [Defendant-Appellee's Brief at 22, n 11]

Defendant has attempted to solve the problem by applying a "clearly erroneous" level of deference to a prior court's scoring decision unless a defendant was prejudiced by the scoring and, then, according the prior court no deference at all. However, nowhere in the statutes does

the legislature articulate the “clearly erroneous” standard of review nor do the statutes discuss according any deference to a previous court’s scoring in a co-defendant’s case. “A court must not judicially legislate by adding into a statute provisions that the Legislature did not include.” In Re Wayne County Prosecutor, 232 Mich App 482, 486; 591 NW2d 359 (1998) Also there is no support for a differentiated level of deference depending on whether it is the defendant or prosecution who benefits from the scoring decision.

The interpretation given by the Court of Appeals in Libbett obviates the problem of inaccurate scoring by a prior court. Instead of according any deference to the prior court, the sentencing court in a defendant’s case looks at the facts on the record demonstrating all charged or uncharged offenders’ actions. The court then assesses the highest number of points possible for any co-offender and applies this score to defendant. This interpretation allows both parties to dispute the scoring in their case.

Defendant states that the goal of uniformity requires that sentencing courts award co-offenders with the same number of points. However, blind uniformity would not effect the goal of MCL 777.31(1) and MCL 777.33(1) which requires the court to award the highest number of points in a defendant’s case. The goal of accurate scoring would also not be furthered. MCL 777.34(10) Also, the People submit that the statute allowing the court to score a co-offender’s actions in defendant’s case was not meant to promote uniformity as much as it was to accurately reflect a defendant’s responsibility for the ramifications of her co-offenders’ conduct when she decides to engage in collective action.

In this case, because the record in defendant’s case demonstrates that Iesha Northington, defendant’s co-defendant, shot James Bish, causing life-threatening injury, when she was fleeing from the armed robbery planned by herself and the defendant, OV 1 and 3 could be scored for

Northington's conduct in the defendant's guidelines.¹ No deference need be given to the prior scoring in Iesha Northington's case.

III. BECAUSE THE LEGISLATURE DID NOT LIMIT MCL 777.31(2)(b) AND MCL 777.33(2)(a) ONLY TO THOSE OFFENDERS CHARGED WITH THE SAME CRIMES, CO-DEFENDANTS ARE HELD RESPONSIBLE FOR THE RAMIFICATIONS OF COLLECTIVE CRIMINAL ENTERPRISE.

Because OV 1 and 3 could be scored for Iesha Northington's assault with intent to murder James Bish, this scoring should also be imputed to the defendant because this case was a multiple offender case and the shooting was a foreseeable result of the armed robbery and an anticipated consequence of the conspiracy.

Defendant's position regarding which cases qualify as multiple offender cases is not internally consistent.² However, whichever test defendant eventually adopts, it is geared to evade responsibility for her own conduct. The ultimate goal of the sentencing guidelines, however, is not for the defendant to avoid the ramifications of her conduct, but instead to reflect the seriousness of her actions taking into consideration the elements of the crime as well as the aggravating and mitigating factors related to the offense. MCL 769.31(d) Therefore, defendant's claim that a scoring cannot encompass actions broader than the elements of the charged offense

¹Defendant claims that Iesha Northington's conduct could not be scored because she shot James Bish after the robbery. However, her conduct could be scored on two grounds. This case was a multiple offender case and Iesha Northington did not have to be charged with the same offense as the defendant for the court to assess points for her conduct. See Argument III Also, courts can permissibly score for conduct that occurs in the same transaction. See Argument V

² Defendant states that a multiple offender case is a criminal prosecution in which one or more individuals are alleged to be culpable for all the offenses charged. [Defendant-Appellee's Brief at 19] Defendant then states that, "[i]f a fact-finder determines in a given case that more than one person was criminally responsible for some or all of the acts, then that is a multiple offender case." [Defendant-Appellee's Brief at 19] Defendant then states that a co-defendant must be charged with the same offense [Defendant-Appellee's Brief at 19] but then concedes that it was not important if the co-defendant were charged but instead that both defendants must be convicted of the same crime. [Defendant-Appellee's Brief at 25]

is not accurate. The legislature would surely wish to account for an aggravating circumstance which also constitutes a crime.³

The appropriate test for a “multiple offender” case is whether, in a given situation, there were multiple individuals involved and whether the particular aggravating circumstance was related to the collective action. Therefore, even though Iesha Northington stole Deborah Sevakis’ purse before she shot James Bish, the defendant was also responsible for the shooting. If a defendant provides a co-offender with a weapon, the defendant naturally anticipates use of the weapon either to subdue the victim, to steal the property and/or to effectuate an escape. In this case it is reasonable to presume that the defendant provided an operable loaded weapon to the co-defendant since the co-defendant was able to shoot James Bish. 66a-68a To further underscore the fact that the shooting was a foreseeable consequence, the defendant expressed no surprise when her co-defendant returned and informed her that she had shot someone. In fact, the defendant then proceeded to take the co-defendant shopping with the proceeds and discarded the weapon. 87a, 146a, 160a Judge McDonald specifically found that the co-offenders did not anticipate only one victim. 212a That the weapon was actually used for the anticipated purpose is an aggravating factor that should be scored and imputed to defendant.

V. MCL 769.31(d) DIRECTS COURTS TO CONSIDER AGGRAVATING FACTORS RELATING TO THE OFFENSE, AND VIOLENCE AGAINST A THIRD PARTY DURING THE SAME CRIMINAL TRANSACTION AS THE CHARGED CRIME IS AN AGGRAVATING FACTOR.

The legislature’s intent regarding the scoring of the guidelines is revealed in its original directive to the sentencing commission to develop the sentencing guidelines. PA 1994, No. 445; MCL 769.33 When defining the prior record variables and offense variables the legislature stated

³ Defendant asserts that MCL 777.46 reveals that a multiple offender case cannot involve uncharged acts. Defendant is incorrect; MCL 777.46 merely extends the time for which a sentencing court can consider uncharged crimes.

that “offense characteristics” included the aggravating and mitigating factors related to the offense that the commission determines were appropriate. The legislature also mentioned that a conviction for a crime listed in MCL 791.233(b) [crimes of violence] which occurred in the same transaction should be considered an aggravating factor. PA 1994, No. 445; MCL 769.31

Defense counsel claims that these statutes should be given no weight because they are not referenced in MCL 777.1 et seq. However, MCL 769.31 and MCL 769.33 clearly articulate the legislative intent undergirding the guidelines. When, as defendant concedes, MCL 777.1 et seq did not specifically indicate whether the guidelines could be scored for a criminal transaction, legislative intent is critical. Defendant also states that the definition of “offense characteristics” should only be used to consider when a court should depart from the guidelines. However, aggravating factors were clearly to be included *in the guidelines themselves* [MCL 769.31(e)] and courts are also directed *not to depart* for “offense characteristics” i.e. the elements and the aggravating factors related to the crime, taken into consideration by the guidelines. MCL 769.34(2)(b)

Also, if defendant’s position were adopted, conduct which occurred in the same transaction would not be taken into consideration in a defendant’s sentencing guidelines because only the crime with the highest class is scored for crimes with concurrent sentences [MCL 777.14(2)(e)(ii)] or the conduct may have been uncharged.⁴ Though defendant states that the court could then depart or score an individual at the top end of the guidelines for this conduct, the legislature’s goal in formulating the guidelines would not be met. MCL 769.31(e); MCL

⁴ The People submit that MCL 777.14(2)(e)(ii) is a clear indication that only guidelines for the highest offense should be scored. Previously, all offenses were to be scored. PA 1998, No. 317 The People submit MCL 777.21(2) meant to refer to Chapter XI not Chapter IX section 14. Also even if the court still had to score all guidelines, the defendant’s conduct on concurrent offenses would not be reflected in the guideline with the highest crime class.

769.33(1)(e)(ii), (iv) Either a routinely aggravating factor would not be scored or would result in disparate departures from the guidelines.

Defendant claims that because in several offense variables the legislature allowed for scoring conduct outside the sentencing offense, the legislature could clearly have included this language in OV 1, 3, and 9. However, each of the guidelines defendant notes allow for scoring outside the criminal transaction, not merely scoring outside the sentencing offense. In OV 12 [MCL 777.42] points can be assessed for conduct which occurred within the 24 hours of the sentencing offense. In OV 13 [MCL 777.42] points can be assessed for conduct which occurred anywhere within a five year period. In OV 16 [MCL 777.46] and OV 10 [MCL 777.40] there is no time limitation. If the legislature had wished to limit the scoring in OV 1, 3, or 9 it could have done so by applying the language of OV 11 [MCL 777.41] to score only that conduct “arising out of the sentencing offense” or OV 7 [MCL 777.37] to score the victim’s fear/anxiety that he or she experienced, “during the offense”.

Defendant claims that if the legislature allowed for scoring in the same transaction it would have included language as in OV 14 [MCL 777.44], which indicates that when determining how to score whether a defendant were a leader, the court should take into consideration *the entire transaction*. However, it would be counterintuitive for the court to be able to review the entire transaction to determine whether the defendant were a leader, but not to score for this leader’s activity during the same transaction.

Furthermore, it is clear that OV 1 and 9 in particular have a broad definition of the term “victim”. OV 1 also includes a defendant’s conduct toward a victim or “a human being” indicating that the legislature wanted defendants to be held responsible for any harm which they

inflicted on persons not traditionally considered “victims”. Because both individuals were placed in danger by the defendants’ conduct, OV 9 should be scored for multiple victims.

VI. WHEN A COURT’S SCORING OF THE SENTENCING GUIDELINES CAN NOT INCREASE A DEFENDANT’S STATUTORY MAXIMUM, A SCORING OF OV 1, 3, OR 9 BY THE SENTENCING COURT DOES NOT VIOLATE DUE PROCESS OF LAW.

Though due process includes protecting a defendant against conviction except by proof beyond a reasonable doubt of every fact necessary to constitute a crime for which she is charged, the legislature may still establish the elements of a crime. Patterson v New York, 432 US 197, 200, 204, 211; 97 S Ct 2319; 53 L Ed 2d 281 (1977) The legislature only runs afoul of the Constitutional safeguards articulated in Apprendi v New Jersey, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), Jones v United States, 526 US 227; 119 S Ct 1215; 143 L Ed 2d 311 (1999), Harris v United States, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), and Ring v Arizona, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002) when it allows an increase of a defendant’s sentence beyond the statutory maximum without a jury determination beyond a reasonable doubt. It is only at this point when the Constitution requires the state to treat a fact not found in the crime-defining statute as an element.⁵ In this case factual-findings underlying scoring of the sentencing guidelines cannot increase the defendant’s maximum sentence. Therefore, these factors cannot be considered functional elements of the crime under the due process clause.

⁵ The People note that different Constitutional Amendments are discussed in the United States Supreme Court cases. This case concerns only the right to have a determination beyond a reasonable doubt of every element of a crime. [Apprendi states that the Fifth Amendment right to presentment has not been applied to the states] However, whether the Fifth Amendment [which applies to a federal prosecution.] or Fourteenth Amendment [which applies to a state prosecution] due process clause in the United States Constitution is discussed, the analysis is the same. When discussing the due process clause right to a jury determination of every element of the crime this Court has also applied the analysis of Apprendi. People v Mass, 464 Mich 615; 628 NW2d 540 (2001)

Defendant has misinterpreted the Supreme Court cases of Apprendi, Harris, and Ring to require a jury finding beyond a reasonable doubt for every sentencing factor. Defendant claims that constitutional protections are triggered if a factor is consistent with a traditional element of a crime and it elevates a defendant's sentence in any respect. The practical implication of defendant's argument would be that every defendant in Michigan would be entitled to a jury-finding on each offense variable because findings on these offense variables elevate a defendant's sentence.

Apprendi made clear, however, that the invocation of the procedural safeguards of the Fourteenth Amendment is not triggered by the "elemental" nature of the factor, but instead the effect of the factor--whether the required finding exposed the defendant to a greater punishment than that authorized by the jury's guilty verdict. Legislatures can legitimately characterize factors as sentencing factors if findings on these factors do not increase the defendant's statutory maximum.⁶ Therefore, according to Apprendi, the facts supporting scoring on OV 1, 3, or 9 did not have to be proven beyond a reasonable doubt; regardless of the court's determination on these factors, the defendant's sentence was less than the maximum of life allowed by the statute and the verdict.

Defendant states that the Supreme Court's later decision in Ring v Arizona, supra modified the rule of Apprendi. According to Arizona law, if a jury found a defendant guilty of first degree murder, the maximum sentence allowed was life imprisonment. It was not until a judge made factual findings on aggravating factors that the death penalty was authorized. The Supreme Court stated that a defendant could not be exposed to a penalty exceeding the

⁶ Apprendi gave an example of the application of its holding. Apprendi stated that if facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute [life]. Any

maximum he would receive if punished according to the facts reflected by the jury verdict alone. In Michigan however, a jury conviction on armed robbery allows a sentence of life imprisonment. A judge's finding cannot elevate the sentence above that of life imprisonment. Ring was also decided the same day as Harris which rejected defendant's contention that any fact increasing a statutory minimum sentence had to be afforded the safeguards accorded to elements.⁷

Defendant next argues that even if the rule established in Appendi were not violated, in this case due process was implicated when the sentencing guidelines were scored for co-defendant's actions.⁸ However, whether the guidelines should be scored for this conduct does not involve a constitutional inquiry. Defendant's cases, which follow the holding of In Re Winship, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970), were not violated because all stand for the proposition that the defendant is entitled to have a jury find her guilty beyond a reasonable doubt of every element of the crime. The defendant in this case was found guilty of all elements of armed robbery.

Appendi, Jones, Harris, and Ring considered whether or when the legislature requires the state to treat a particular fact not in a crime-defining statute as an element. As stated previously, these holdings were not violated in this case and defendant has presented no

lesser sentence than life does not invoke the "[c]ore concerns animating the jury and burden-of-proof requirements."

⁷ Though the holding of the Washington court in State v Blakely, 111 Wash App 851; 47 P3d 149 (2002) should stand, even the position of defendant in Blakely is inconsistent with the position of the defendant in this case. In Blakely the defendant merely argued that the defendant's sentence violated Appendi because it *exceeded* the statutory guidelines. The defendant's sentence in this case was below the sentencing guidelines.

⁸ As stated in Argument III, if a defendant claims that the actions of a co-defendant were unanticipated or that the defendant was not involved in a collective action, defendant can challenge the sentencing court's determination at sentencing that the case is a multiple offender case.

argument that the due process clause of the state constitution should be interpreted any differently.⁹ See: People v Sierb, 456 Mich 519, 523; 581 NW2d 219 (1998)


RELIEF

WHEREFORE, David Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Danielle DeJong, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court reverse the Court of Appeals' ruling remanding for resentencing.

Respectfully submitted,

DAVID GORCYCA
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BY:


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DATED: April 2, 2004

⁹ As mentioned in Witte v United States, 515 US 389, 402-403; 115 S Ct 2199; 132 L Ed 2d 351 (1995) when discussing the federal sentencing guidelines, "to the extent that the Guidelines aggravate punishment for related conduct outside the elements of the crime on the theory that such conduct bears on the character of the offense, the offender is still punished only for the fact that the present offense was carried out in a manner that warrants punishment, not for a different offense." Witte also stated that the commission of multiple offenses in the same course of conduct also necessarily provides important evidence that the character of the offender requires special punishment. Id. The definition of a crime does not automatically dictate the punishment, and where the legislature grants courts discretion at sentencing, the court's possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant-if not essential to the selection of the appropriate sentence. Lockett v Ohio, 438 US 586, 602; 98 S Ct 2943; 57 L Ed 2d 973 (1978); Williams v New York, 337 US 241, 246-257; 69 S Ct 1079; 93 L Ed 2d 1337 (1949)